UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., et al.,	)	
Plaintiffs,	)	No. 03 C 7869
v.	)	Judge David H. Coar
BULKMATIC TRANSPORT COMPANY,	)	Magistrate Michael T. Mason
Defendant.	)	

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs, the Owner-Operator Independent Drivers Association ("OOIDA"), and OOIDA members Andrey Braslavets; Nelson Hernandez; Simon Jamel; Joseph Lopez; Peter C. Mango; David P. Paul; John W. Robertson; John A. Smith; Thomas R. Taylor; and Kenneth S. Ward (Plaintiffs), have moved for Partial Summary Judgment as to liability on Count III of the Complaint against Defendant Bulkmatic Transport Company ("Defendant"). In support of the Motion, Plaintiffs establish the following material facts as to which there is no genuine dispute:

1. Bulkmatic is an authorized motor carrier providing transportation services to the shipping public under authority granted by the ("DOT"). Answer ¶ 1 ("Ans.") (attached as Exhibit A).

2. Bulkmatic is in the business of transporting various products in bulk tank trailers. Included among the products transported in Bulkmatic tank trailers are food products such as flour, sugar and grain; and non food products such as chemicals and plastics. (Deposition of

Elmer Larry Smith, Senior Vice President of Bulkmatic, September 21, 2004 ("Smith Dep.") at 41-42)(relevant portions of Smith's testimony are attached as Exhibit F)).

3. Each plaintiff has entered with Bulkmatic a "Lease Agreement" under which the owner-operator provides trucking equipment and driving services to Bulkmatic. Ans. ¶ 1.

4. Bulkmatic uses a standard form Lease Agreement which is materially identical for all owner-operators. (Deposition of Fred J. Flaxmayer, Senior Vice President of Finance, September 21, 2004 ("Flaxmeyer Dep") at 92-94 (a copy of the Lease Agreement is attached as Exhibit B and relevant portions of Flaxmayer's testimony are attached as Exhibit D)).

5. Bulkmatic drafts the Lease Agreement. The terms of the Lease Agreements are not negotiated with individual owner-operators. (Flaxmayer Dep. at 92-94).

6. Each Lease Agreement contains the following identical provision governing driver compensation:

> LESSEE shall pay to LESSOR for the use of said equipment and driver, or for equipment alone, if no driver is being leased, as follows:
>
> XX % of gross revenue

(Lease Agreement ¶D.1.; Flaxmayer Dep. at 11, 92-94).

7. The percentage of gross revenue specified in each Lease Agreement ranges from 62 percent to 67 percent. (Flaxmayer Dep. at 11).

8. Bulkmatic bills customers for each shipment by forwarding an invoice either in paper form or electronically. (Flaxmayer Dep. at 23-26; Chart and supporting documentation attached as Exhibit C).

9. Shippers are charged by Bulkmatic for transportation services by various rates

including by flat rate, by hundred weight, by ton rate and by per mile rate. (Smith Dep. at 63; Flaxmayer Dep. at 26-27).

10. Included in the transportation services charged to shippers by Bulkmatic are charges for transporting the product, transfer of the product to and from the tank, sealing the tank, cleaning the tank, fuel surcharges, tolls and detention (waiting time) Charges for services other than transporting the product are sometimes referred to as "accessorial" charges. (Smith Dep. at 63-64; Flaxmayer Dep. at 48; Letter dated December 16, 2004 from Bruce Radke, Counsel for Bulkmatic to Joyce E. Mayers, Counsel for Plaintiffs supplementing deposition testimony ("Dec. 16, 2004 Ltr." attached as Exhibit E); Exhibit C and supporting documentation).

11. Whether a shipper is charged by flat rate, by hundred weight, by ton rate or by per mile rate, some or all of the services provided may be rolled into the rate charged and not itemized on an invoice. (Smith Dep. at 63-64; Flaxmayer Dep. at 54-55).

12. Invoices from Bulkmatic to a shipper may show one undivided total charge per load transported or may include a separate charge for specified items which is then totaled on the invoice. (Flaxmayer Dep. at 48; Exhibit C and supporting documentation).

13. The same amount may be charged for transporting a load on the same delivery route regardless of whether certain services are provided every time a load is carried over that route. For example, a tank wash may be performed only when product build up in the tank requires that it be cleaned. (Smith Dep. at 40-42).

14. The account receivable for each shipment reported in Bulkmatic's accounting system is recorded as one total invoice amount which includes all charges billed on the invoice for the shipment. (Flaxmayer Dep. at 18, 28).

15. Bulkmatic provides owner-operators a settlement statement that sets out their compensation for each individual shipment they move. (Flaxmayer Dep. at 31-35 ; Exhibit C and supporting documentation).

16. Each invoice for a shipment moved by an owner-operator can be linked to an owner-operator settlement by a unique identifying number. (Flaxmayer Dep. at 15, 23, 51; Exhibit C and supporting documentation).

17. Owner-operator compensation is generally calculated based upon a revenue amount that is reduced from the full amount billed to the shipper. (Exhibit C and supporting documentation).

18. Before owner-operator compensation is calculated, the total revenue received from the shipper is reduced for amounts attributable to charges for items including loading and unloading the product, sealing the tank, and cleaning the tank regardless of whether the owner-operator participates in providing the service or whether the service is performed. (Exhibit C and supporting documentation; Deposition of Peter C. Mango ("Mango Dep.") at 34- 35, 60-61 (relevant pages of Mango's testimony are attached as Exhibit G); Deposition of John Smith ("J. Smith Dep.") at 74-78, 108-111 (relevant pages of J. Smith's testimony are attached as Exhibit H); Deposition of Simon Jamel ("Jamel Dep.") at 21-25 (relevant pages of Jamel's testimony are attached as Exhibit I); Deposition of Joseph Lopez ("Lopez Dep.") at 44-48 (relevant pages of Lopez's testimony are attached as Exhibit J); Deposition of Thomas R. Taylor ("Taylor Dep.") at 32, 61-62 (relevant pages of Taylor's testimony are attached as Exhibit K); Deposition of Nelson Hernandez ("Hernandez Dep.") at 15-19 (relevant pages of Hernandez's testimony are attached as Exhibit L).

19. Before owner-operator compensation is calculated, the total revenue received from the shipper is reduced by amounts which cannot be explained. (Exhibit C and supporting documentation).

20. Bulkmatic does not provide owner-operators with a copy of the freight bill for shipments, does not provide owner-operators with documentation containing the same information as would be provided on the freight bill, and has refused to provide such information and documentation upon request by owner-operators. (Mango Dep. at 31-33, 85-86; J. Smith Dep. at 139-143; Jamel Dep. at 100-101; Lopez Dep. at 157-160; Deposition of Stan Ward ("Ward Dep.") at 39-40 (relevant pages of Ward's testimony are attached as Exhibit M).

21. This Court has subject matter jurisdiction over is action pursuant to 28 U.S.C. §§ 1331 and 1337. Ans. ¶ 4.

22. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) in that Bulkmatic is incorporated in Illinois and maintains terminals in this District at Argo and Chicago Heights, Illinois. Ans. ¶ 5.

Respectfully submitted,

/s/ Albert E. Fowerbaugh, Jr.

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